

Neutral Citation no. [2008] NICA 9

Ref: CAM7064

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 6/2/08

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

**THE CHIEF CONSTABLE OF THE POLICE SERVICE
OF NORTHERN IRELAND**

Appellant;

and

MARK SEAN O'DONNELL

Respondent.

Before: Campbell LJ, Higgins LJ and Coghlin J.

CAMPBELL LJ

[1] The question that the Resident Magistrate, sitting at Omagh, has stated for the consideration of the court is:

“Whether [she] was correct in law to find that the Defendant was not guilty of an offence of driving without a valid licence under Article 3(1) of the Road Traffic (Northern Ireland) Order 1981 when he was the holder of a valid provisional driving licence, issued to him by the Republic of Ireland, authorising him to drive a vehicle of the class which he was driving”.

The facts

[2] Mark Sean O'Donnell, who is the respondent in this appeal, resides in Lifford, County Donegal. On 7 April 2007 he was stopped by a police officer

when driving a Volkswagen Polo on the A5 Doogary Road, Omagh. He was asked for his driving licence and he produced a provisional licence issued on 13 August 2006 in the Republic of Ireland. He was asked also for his insurance documents and he said that he did not have any insurance.

[3] The respondent was charged with the offences of using a motor vehicle without a policy of insurance contrary to article 90(4) of the Road Traffic (NI) Order 1981 and driving without being the holder of a driving licence authorising him to drive a motor vehicle of the class contrary to article 3(1) of the Order.

[4] He did not appear and was not represented in the magistrates' court in Omagh, on 24 April 2007 when the Resident Magistrate convicted him of the offence of driving without insurance and dismissed the charge of driving without being the holder of a driving licence.

[5] Following this decision the appellant asked the Resident Magistrate to state the case that is now before the court. The respondent did not appear and was not represented in this court and at the outset of the hearing Mr Valentine (who appeared for the appellant only on the appeal) raised two preliminary matters. Article 146 of the Magistrates' Courts (NI) Order 1981 provides that the time for delivery of an application for a case stated to the clerk of petty sessions and to the other party is a period of 14 days from the date of the decision of the magistrates' court. As the case of *DPP v Harris* [2007] NICA 51 shows the observance of the statutory requirement to serve a copy of the application on the respondent within this time is a precondition to the Court's jurisdiction, in accordance with the decision in *Dolan v O'Hara* [1975] NI 125.

[6] The application for a case stated was dated 4 May 2007, and allowing for 14 days from the decision of the Resident Magistrate the application had to be received by the clerk and the respondent no later than 7 May 2007. In an affidavit Ms. Jacqueline Flynn, senior prosecutor in the Public Prosecution Service, has stated that the certificate of postage shows that it was received by the respondent at his address in Donegal on 8 May 2007. The Interpretation Act (NI) 1954 provides in section 39(4):

“Where the time limited by an enactment for the doing of anything expires upon a Sunday or a public holiday, the time so limited shall extend to and the thing may be done on the first following day that is not a Sunday or a public holiday.”

Monday 7 May 2007, was a public holiday both in Northern Ireland and in the Republic of Ireland and the reception of the application on 8 May 2007, the first following day, was therefore within the time prescribed.

[7] The second matter, which Mr Valentine brought to the courts attention, was that the time limited by article 146(9) of the Magistrates' Courts (NI) Order 1981 for delivery of the settled case stated to the respondent is within 14 days of the date when the clerk dispatches the case stated to the appellant. The settled case stated was transmitted to the appellant on 19 June 2007 and the appellant sent it by recorded delivery post to the respondent on 25 June 2007. There is no proof that the settled case stated was delivered to the respondent as Royal Mail does not have any record of delivery. According to Royal Mail their aim is that delivery to an address in the Republic of Ireland should take place within three working days.

[8] Section 24 of the Interpretation Act reads as follows:

“24.- (1) Where an enactment authorises or requires a document to be served by post, whether the word “serve” or any of the words “give”, “deliver” or “send” or any other word is used, the service of the document may be effected by prepaying, registering and posting an envelope [or by recorded delivery post] addressed to the person on whom the document is to be served at his usual or last known place of abode or business and containing such document; and, unless the contrary is proved, the document shall be deemed to have been served at the time at which such envelope would have been delivered in the ordinary course of post.

(2) Where an enactment authorises or requires a document to be served on any person without directing it to be served in a particular manner the service of that document may be effected either-

- (a) by personal service; or
- (b) by post in accordance with sub-section (1); or
- (c) by leaving it for him with some person apparently over the age of sixteen at his usual or last known place of abode or business”

Accordingly in the absence of any proof to the contrary the settled case stated is deemed to have been delivered to the respondent within the period limited by the Order.

[9] When the respondent was charged with the offence of driving without a valid licence article 3(1) of the Road Traffic (NI) Order 1981 provided:

“It is an offence under this Order for a person to drive on a road a motor vehicle of any class if he is not the holder of a licence authorising him to drive a motor vehicle of that class.”

Article 3(1) was amended by the Road Traffic (Northern Ireland) Order 2007, with effect from 15 November 2007, and now reads:

“It is an offence under this Order for a person to drive on a road a motor vehicle of any class otherwise than in accordance with a licence authorising him to drive a motor vehicle of that class.”

[10] The provisional driving licence held by the respondent was issued in the Republic of Ireland under section 35(1) of the Road Traffic Act 1961 to a person “who desires to learn to drive.” It is not necessary to pass a driving test before being permitted to hold a provisional licence.

[11] Council Directive 91/439/EEC of 29 July 1991 (The first Directive) applies by virtue of a decision of 7/94 of the EEA Joint Committee (O.J. L160, 28.6.94, p 1), to States within the European Economic Area. The purpose of the Directive is that:-

“Whereas for the purpose of a common transport policy, and as a contribution to improving road safety, as well as to facilitate the movement of persons settling in a member state other than that in which they have passed a driving test, it is desirable that there should be a Community model national driving licence mutually recognised by the Member States without any obligation to exchange licences.”

Article 7 of the Directive provides that:-

“1. Driving licences shall, moreover, be issued only to those applicants:

- (a) who have passed a test of skills and behaviour and a theoretical test and who meet medical standards, in accordance with the provisions of Annexes II and;

- (b) who have their normal residence in the territory of the Member State issuing the licence, or can produce evidence that they have been studying there for at least six months.”

[12] The first Directive has been recast by Council Directive 2006/126/EC (the second Directive) and the main provisions of it came into force on 19 January 2007. The preamble states:

“On road safety grounds, the minimum requirements for the issue of a driving licence should be laid down. Standards for driving tests and licensing need to be harmonised. To this end the knowledge, skills and behaviour connected with driving motor vehicles should be defined, the driving test should be based on these concepts and the minimum standards of physical and mental fitness for driving such vehicles should be redefined.”

[13] The second Directive goes on to provide in Article 5:

“1. Driving licences shall be issued only to those applicants:

- (a) who have passed a test of skills and behaviour and a theoretical test and who meet medical standards, in accordance with the provisions of Annexes II and III;
- (b) who have passed a theory test only as regards category AM; Member States may require applicants to pass a test of skills and behaviour and a medical examination for this category. ...”

[14] The Directive was implemented into the law in Northern Ireland by amending the Road Traffic (NI) Order 1981. Article 4 of the Order provides;

“Exceptions

4.- (1) Notwithstanding Article 3, a person may drive or cause or permit another person to drive a vehicle of any class if-

- (a) the driver has held -
...

(ia) a Community licence to drive vehicles of that or a corresponding class,”

A community licence is defined in Article 19D(1)(c) of the 1981 Order as follows:-

“Community licence” means a document issued in respect of an EEA State other than the United Kingdom by an authority of that or another EEA State (including the United Kingdom) authorising the holder to drive a motor vehicle, not being -

- (a) ... ; or
- (b) ... ; or
- (c) a document issued for a purpose corresponding to that mentioned in Article 13(2)”

[15] Article 13(2) of the 1981 Order provides:-

“(2) If the application for the licence states that it is made for the purpose of enabling the applicant to drive a motor vehicle with a view to passing a test of competence to drive, any licence granted in pursuance of the application shall be a provisional licence for that purpose, and nothing in Article 5 shall apply to such a licence.”

Article 5 relates to the grant of a driving licence (as opposed to a provisional licence).

[16] A Community licence holder, as defined in Article 19(D), not ordinarily resident in Northern Ireland, may drive in Northern Ireland a motor vehicle of any class which he is authorised by his Community licence to drive – see Article 15A of the Road Traffic Order (which was inserted by the Driving Licences (Community Driving Licence) Regulations (Northern Ireland) 1996 (SR 1996/426).

[17] The respondent’s provisional licence was issued for a purpose corresponding to that mentioned in article 13(2) of the Road Traffic (NI) Order 1981 and did not come within the definition of a Community licence in article 19(D)(1)(c). Since he did not hold a Community licence he was in breach of article 3 of the Road Traffic (NI) Order 1981. The question posed by the Resident Magistrate must therefore be answered in the negative. The case will be remitted to her with a direction to convict.

[18] We have reached this conclusion having had before us a detailed skeleton argument and oral presentation of the argument by Mr Valentine. In addition we have had research carried out on our behalf by a legal officer of the court. The Resident Magistrate, though familiar with Community licences would appear not to have had drawn to her attention the exception of provisional licenses from the definition of Community licence. We note that in the Code for Prosecutors, issued pursuant to the statutory duty placed on the Public Prosecution Service by section 37 of the Justice (Northern Ireland) Act 2002, at paragraph 5.1.4 one of the roles of the prosecutor in court is to ensure that 'he/she assists the court on all matters of law and practice applicable to the case'. We regard this as being particularly important in the setting of a magistrates' court where a resident magistrate cannot be expected, in the middle of a busy court, to take time to thread her way through an intricate and unfamiliar body of legislation such as this without assistance. In future in a similar situation a skeleton argument should be provided for the court if only to alert it to the fact that the matter may not be as straightforward as at first appears.